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Supreme Court, U.S.
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No. 93-1298

In The

Supreme Court of the United States

October Term, 1993

WILLIAM E. HALL, ET AL.,

Petitioners,

v.

JIMMIE LYNN MARTIN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

JIMMIE LYNN MARTIN, WILLIAM SINGLETON, III AND BRENT MARTIN'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners assert the following questions in their petition for writ:

1. Whether the Equal Protection Clause of the Fourteenth Amendment prevents application of the parental immunity doctrine to bar Petitioner Katherine Singleton's action for negligence against the non-adopting stepfather, mother and deceased father.

2. Whether the Due Process Clause of the Fourteenth Amendment prevents application of the parental immunity doctrine to bar Petitioners' action for negligence against her non-adopting stepfather, mother and deceased father.

Petitioners asserted these questions for the first time in their Motion for Rehearing in the Beaumont Court of Appeals. There was never any issue properly presented to or decided by the state courts regarding any federal constitutional right. Therefore, these questions are not properly presented here for the first time. Additionally, there are alternative, independent and adequate state grounds to support the state's judgment, therefore, this writ is improper and should be dismissed.

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JIMMIE LYNN MARTIN, WILLIAM SINGLETON, III AND BRENT MARTIN'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, Jimmie Lynn Martin, Brent Martin and William Singleton, III, respectfully file this Brief in Opposition to Petitioners' Writ of Certiorari and pray that the Supreme Court dismiss or in the alternative deny the Petition for Writ of Certiorari seeking review of the denial of the Writ of Error of the Supreme Court of Texas and the judgment of the Ninth Court of Appeals of the State of Texas at Beaumont.

STATEMENT OF THE CASE

The action underlying this appeal is a claim for damages for personal injuries sustained by Katherine Singleton (an unemancipated minor), as a result of a motorcycle accident in which Katherine Singleton was involved, on or about June 2, 1987. The trial court granted summary judgment in favor of Respondent, Jimmie Lynn Martin, on February 5, 1991, against Plaintiff, William E. Hall, Jr., a/n/f of Katherine Singleton, Counter-Plaintiffs, James Richard Hicks and Karen Hicks, and Counter-Plaintiff/Cross-Plaintiff Montgomery County. The trial court also granted Respondents Brent Martin and William Singleton, III's summary judgment motions. The causes of action against Respondents were severed and made final. Petitioners filed their appeal to the Court of Appeals, Ninth District of Texas at Beaumont. The Court of Appeals affirmed the judgments of the trial court. *Hall v. Martin*, 851 S.W.2d 905 (Tex. App. – Beaumont 1993, writ denied). The Texas Supreme Court denied Petitioners' Application for Writ of Error and this decision became final on October 27, 1993.

STATEMENT OF JURISDICTION

The Plaintiff has invoked Supreme Court Rule 10 which states:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate

> the character of reasons that will be considered: . . .
>
> > (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

For the Supreme Court to grant writ of certiorari there must be a federal question involved. Whether there is a federal question is the petitioner's burden of proof. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1947).

The United States Supreme Court lacks jurisdiction based upon affirmation of summary judgments on "adequate and independent state grounds". *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). In *Hall v. Martin*, 851 S.W.2d 905 (Tex. App. – Beaumont 1993, writ denied), the court affirmed the granting of summary judgments on two separate grounds; 1) the parental immunity doctrine and 2) negligence and proximate cause. The Court of Appeals specifically held "[a]s a separate, distinct and independent basis for our affirmance of the judgments below, we conclude that the movants have negated the issues of negligence and proximate cause." *Id.* at 910. The Court found that there was no legal duty owed to Katherine Singleton by her parents, Jimmie Lynn Martin, William Singleton, III and Brent Martin and therefore no breach of a duty. Furthermore, the court affirmed the granting of the summary judgments in finding no proximate cause. "The record negates proximate cause as to each appellee." *Id.* at 911.

Because the opinion in *Hall* rests upon "adequate and independent state grounds", the Petitioners' Writ is not reviewable by this Court. It is well settled law that writ

will not be granted where there are independent and adequate state grounds to support the judgment. The Court reconsidered this issue in *Sochor v. Florida*, 119 L.Ed.2d 326, 112 S.Ct. ___, 504 U.S. ___ (1992), in which the court stated that:

> this court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate, independent state ground . . . as it will if the state court's opinion indicates clearly and expressly that the state's ground is an alternative holding.

Id. at 337. This is only a restatement of the case law, which is well settled on this issue. *Herb v. Pitcairn*, 324 U.S. 117 (1944), *McCoy v. Shaw*, 277 U.S. 300 (1927), *Bell Telephone Co. of Pennsylvania v. Van Dyke*, 296 U.S. 533 (1935). The Texas state court's opinion can not even remotely be said to be grounded upon federal law. A thorough reading of the *Hall* opinion clearly shows adequate and independent state grounds for affirming the summary judgments. *Id.* at 910-911. *See also, Buchanan v. Rose*, 138 Tex. 390, 159 S.W.2d 109 (1942); *Farley v. M & M Cattle Co.*, 529 S.W.2d 751 (Tex. 1975) and *Clark v. Waggoner*, 452 S.W.2d 437 (Tex. 1970). Therefore, all federal constitutional arguments concerning the parental immunity doctrine are not reviewable by this Honorable Court. *Michigan v. Long*, 463 U.S. 1032 (1983). Based upon the foregoing, this Court should respectfully decline to consider this Writ of Certiorari.

In addition, the Petitioners fail to cite any cases that support their position that there are conflicting state and federal decisions. Petitioners merely restate the contents

of the United States Supreme Court Rule 10.1(b) and 10.1(c). Likewise, the invocation of this Court's jurisdiction based upon the importance of the constitutional question involved is inappropriate based on the "adequate and independent state grounds" that supported the decision below. *Michigan v. Long; Hall v. Martin.*

STATEMENT OF FACTS

Respondents, Jimmie Lynn Martin, Brent Martin and William Singleton, III, challenge Petitioners' Statement of Facts in its entirety because of its argumentative and exaggerated presentation, especially with respect to the nature of Katherine Singleton's injuries. Therefore, Respondents present the following Statement of Facts in addition to the chronicle of events as stated in the opinion in *Hall v. Martin.*

This is a personal injury negligence action arising from a motorcycle accident which occurred on or about June 2, 1987, in Montgomery County, Texas. (*See* Tr. Vol. II, #10, p. 185). Karen Hicks and James Richard Hicks were the owner and operator (respectively) of the Honda Hurricane Motorcycle involved in this accident. (*See* Tr. Vol. II, #10, pp. 186-187). Katherine Singleton was riding as a passenger on the Hicks motorcycle pursuant to a request from Katherine Singleton. During the motorcycle ride, Hicks lost control and/or was caused to lose control of his motorcycle resulting in the accident made the basis of this lawsuit. (*See* Tr. Vol. I, #10, pp. 186-187). As a result, Katherine Singleton sustained injuries. (*See* Tr. Vol. II, #10, pp. 249-250). At the time of the accident, Jimmie

Lynn Martin was unaware that her daughter would be riding a motorcycle. (*See* Tr. Vol. I, #3, p. 39).

Respondent, Jimmie Lynn Martin, is the natural mother of the minor, Katherine Singleton. William Singleton, III was Katherine's natural father and Brent Martin is Katherine's stepfather. At the time of the accident, Katherine Singleton resided with and was cared for by her mother, Jimmie Lynn Martin and stepfather, Brent Martin. (*See* Tr. Vol. II, #10, pp. 249-250). Respondent, Jimmie Lynn Martin was returning home from work at approximately 4:45 p.m., on June 2, 1987, when she discovered that her daughter had been involved in a motorcycle accident. Katherine Singleton was fourteen (14) years old at the time of the accident. (*See* Tr. Vol. II, #10, p. 241). Katherine Singleton had her mother's permission to ride her **mo-ped** in the neighborhood the day of the accident. (*See* Tr. Vol. II, #10, p. 208). Katherine Singleton did not ask for permission to ride Hicks' motorcycle. The Respondents take exception to the Petitioners unsubstantiated assertion that Katherine Singleton "sustained permanent brain impairment". Petitioners' writ at 16. There is no evidence in the record of the extent of Katherine Singleton's injuries.

Further, Jimmie Lynn Martin and William Singleton, III were divorced in April of 1982 in Harris County, and William Singleton, III was granted visitation and rights as the possessory conservator. (Tr. Vol. III at 384-85). At the time of the accident, William Singleton, III did not have custody or control of his minor daughter who was residing with her mother. (Tr. Vol. III at 386). Respondent, William Singleton, III, did not learn of the accident until his daughter was at the hospital. At no time relevant to

this lawsuit did he give the minor plaintiff instructions regarding the riding of a motorcycle, nor did he give her permission to ride with James Hicks on his motorcycle. (Tr. Vol. III at 346). At no time relevant to this lawsuit did William Singleton have custody, or the right to control, or supervise his daughter. William Singleton passed away on June 3, 1992 after this appeal was taken and judgment rendered.

Brent Martin, is the step-father of Katherine Singleton. (Tr. at 317, 389, 399). He received Katherine into his home and held her out as a member of his family. He assumed the care and support of Katherine on February 19, 1983. However, he never adopted Katherine and has never been appointed as her conservator. On June 2, 1987, nor on any other date, did Brent Martin have knowledge that Katherine was riding a motorcycle. At no time did he give Katherine permission to ride a motorcycle, nor did he have personal knowledge of this accident or the events leading to the accident until he was informed that Katherine was injured and in the hospital. (Tr. at 399-400).

PROCEDURAL HISTORY

All three respondents filed a motion for summary judgement based on the parental immunity doctrine, which applies in Texas, to allegations of negligence in the exercise of a parental role, and also on the basis that plaintiff could not establish as a matter of law, that the accident and injuries were proximately caused by any conduct or omission of any of the three respondents.

The trial court granted the motions for summary judgment. Thereafter, plaintiff severed these defendants from the case, and appealed the trial court's granting of the summary judgments in the Court of Appeals, Ninth District of Texas at Beaumont. The issues presented on appeal were that (1) the conduct of the defendants did not fall within the parameters of the parental immunity doctrine, (2) there were material issues as to whether or not defendants conduct was the proximate cause of the accident, and (3) that the parental immunity doctrine violated the Texas Constitution. Petitioners failed to state any federal question, and, in fact, do not even cite to either the Texas Constitution or the United States Constitution in their brief. The question of state constitutionality was raised in dicta and not as a main point of error.

The Beaumont Court of Appeals upheld the granting of the summary judgments for all three respondents on both grounds, holding that their conduct was immune from lawsuit because of the parental immunity doctrine, and further, that plaintiffs could not establish proximate cause as a matter of law. After Petitioners made a motion for rehearing, which was denied without an opinion, an Application for Writ of Error was filed in the Texas Supreme Court which was also denied without opinion.

WAIVER OF CONSTITUTIONAL CLAIMS

The Petitioners have failed to perfect their Federal Fourteenth Amendment arguments in the lower courts and therefore cannot raise them for the first time in this

Court. 28 U.S.C. § 1257. *See* Responses in Opposition to Motion for Summary Judgment of Respondents (Tr. Vol. III, #29, pp. 34-36). In examining this document, the Court will see that the Petitioners did not perfect the federal constitutional argument. The Petitioners did not address the Texas parental immunity doctrine's federal constitutionality. On appeal, the Petitioners tried to stretch the rationale in *Price v. Price*, 732 S.W.2d 316 (Tex. 1987) (inter-spousal immunity eliminated in tort personal injury actions), to encompass the parental immunity doctrine based upon *Price's* use of the Texas Constitution, Article I, Section 3, not the United States Constitution. (Tr. Vol. III, #29, p. 36). The Petitioners briefly mentioned that the parental immunity doctrine was unconstitutional on its face as applied in this case. The Petitioners, however, do not cite which constitution they seek to invoke or what provisions of either may apply. Furthermore, there are no constitutional cites specifically referred to in Petitioners' brief or table of authorities. The only clue as to which constitution Petitioners seek to invoke is their citation to *Lucas v. United States*, 757 S.W.2d 687 (Tex. 1988), in which the Texas Supreme Court answers a certified question from the Fifth Circuit regarding the application of the Texas Constitution to the statutory limitations on medical malpractice damages. The mere citation of *Lucas* does not invoke or perfect Petitioners' arguments presented to this court. *Webb v. Webb*, 451 U.S. 493 (1981) is illustrative of exactly the type of situation presented in this case. In *Webb*, this Court stated:

> This Court has frequently stated that when 'the highest state court has failed to pass upon a federal question, it will be assumed that the

> omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'
>
> *Id.* at 495.

Further, a vague assertion to a constitutional principle will not preserve a due process argument in the Supreme Court. *Bankers Life and Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988). A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision. *Taylor v. Illinois,* 484 U.S. 400 (1988).

Petitioners did address the Texas constitutional argument in their brief to the Appeals Court and it was dismissed because the case authority that Petitioners raised was that of other jurisdictions not controlling in Texas. The Beaumont Court of Appeals held "[w]e conclude the question of constitutionality is no longer in doubt." *Hall* at 910. The court did not address any United States Constitutional arguments as they where not properly raised by Petitioners. Furthermore, even the dissent recognized that Petitioners' argument was confined to the application of the equal protection clause of the Texas Constitution.

> "Katherine argues that such a restriction (parental immunity) is prohibited by the equal protection clause of the Texas Constitution."
>
> *Hall* at 912.

Under Texas law "[i]ssues not expressly presented to the trial court by written motion or response to the

motion for summary judgment cannot be considered on appeal as grounds for reversal." *Hall* at 908.

The law is clear as mandated by this Court that a federal question must be properly presented and considered by a state court before this Court will have jurisdiction to grant certiorari. Further, when the federal constitution is not specifically mentioned in the state's opinion or the Petitioner's brief, the court will conclusively presume that the state constitution was intended. *Osborne v. Clark*, 204 U.S. 565 (1960). Additionally, merely the averment in a petition for writ of error that a federal question was raised and decided in the state court is insufficient in itself to give the court jurisdiction. *Id.* at 565. The Court will not even consider a petition for writ of certiorari where the Petitioner failed to even reference a federal question in his brief to the state. *Gibbs v. Zimmerman*, 290 U.S. 326 (1933); *Chappell v. Bradshaw*, 128 U.S. 132 (1888).

The attempt of the Petitioners to raise a federal question for the first time on rehearing, as in this case, is too late. In *Herndon v. Georgia*, 295 U.S. 441 (1935), *rehearing denied*, 296 U.S. 661 (1935), dismissing a writ on these grounds, this Court held:

> The long established general rule is that the attempt to raise a federal question after judgment upon a petition for rehearing comes too late unless the court actually entertains the question and then decides it. *Id.* at 443.

See also Chicago I and L.R. v. McGuire, 196 U.S. 128 (1904); *Jett Brothers v. Carrollton*, 252 U.S. 1 (1919).

Furthermore, the court of appeals denied the motion for rehearing with no opinion as did the Texas Supreme Court deny the application for writ of error. As held in *Stembridge v. State of Georgia*, 343 U.S. 541 (1952):

> Where the highest court delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this court will not take jurisdiction to review the judgment. *Id.* at 547.

Because Petitioners did not perfect their constitutional argument under the United States Constitution, this Court should deny certiorari to Petitioners.

PARENTAL IMMUNITY DOCTRINE IS CONSTITUTIONAL

Should this Court decide that the Petitioners did perfect their constitutional arguments and that the opinion of *Hall, supra* did not rest on "adequate and independent state grounds", Respondents urge that the Fourteenth Amendment arguments presented by Petitioners should fail. Petitioners attempt to invoke the United States Constitution's protection under the Fourteenth Amendment's Equal Protection Clause and Due Process Clause, which provide:

> No state shall . . . deprive any person of life, liberty, or property, without due process; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, Sec. 1.

STANDARD OF REVIEW FOR CONSTITUTIONAL QUESTIONS

When a state's laws are attacked on equal protection grounds, the "state laws are generally entitled to a presumption of validity." *Parham v. Hughes*, 441 U.S. 347, 351 (1979). Different levels of scrutiny are applied for equal protection analysis depending upon the type of individual rights that are effected by the alleged discriminatory classification. A three tier analysis is used when ruling upon the equal protection claims under the Fourteenth Amendment to the United States Constitution, depending upon the rights and or classification under scrutiny. *Plyler v. Doe*, 457 U.S. 202 (1982); *Spring Branch I.S.D. v. Stamos*, 695 S.W.2d 558 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). This analysis starts by examining the classification created and determining whether this classification infringes upon a fundamental right or interest or burdens an inherently suspect class. *Plyler*.

Applying this analysis to the facts of this case, the inquiry focuses upon whether an unemancipated minor has a fundamental right to sue her parents for ordinary negligence. In *Lucas*, Justice Gonzalez in his dissenting opinion recognized that "the right accorded to a plaintiff to sue in tort for an injury is not a fundamental right." *Lucas* at 695 (Gonzalez J. dissenting) (citing *Sibley v. Board of Sup'rs of Louisiana*, 462 So.2d 149, 155, Opinion modified, 477 So.2d 1094 (La. 1985). The right to vote, the rights guaranteed by the First Amendment, the right to privacy, the right to procreate and the right to interstate travel have been identified as "fundamental rights". *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312

(1976) at FN3; *Clark v. State of Texas*, 665 S.W.2d 476 (Tex. Cr. App. 1984).

Respondents assert that Petitioners are misleading this Court in advancing their proposition that an unemancipated minor has a fundamental right to bring suit against her parents. In a case cited by Petitioners, *Moran v. Beyer*, 734 F.2d 1245, 1246 (7th Cir. 1984), the court held that the right of a spouse to bring suit against the other spouse is not a fundamental right. *Id.* Also, Petitioners have incorrectly used as authority the case of *White v. State*, 661 P.2d 1272 (Mont. 1983) in their assertion that the right to bring a civil action for personal injuries is a fundamental right. The court in *White* is interpreting the Montana Constitution, not the United States Constitution. Therefore, this case is inapplicable to our analysis. Further, the Court has held that the right to bring a cause of action in tort is not a fundamental right and the deprivation of that right is not a violation of due process. *Siegert v. Gilley*, 500 U.S. 226 (1991), *rehearing denied*, 111 S.Ct. 2290 (1991).

Because an unemancipated minor does not have a "fundamental" right to sue her parents, the analysis turns to whether the parental immunity doctrine as it now exists in Texas creates a suspect classification. The parental immunity doctrine does not create a suspect class as it neither infringes nor benefits a class of citizens based upon race, gender, or religious affiliation. *Plyler v. Doe*, 457 U.S. 202 (1982). " 'Suspect' classifications are only those classifications which are likely to reflect deep seated prejudice rather than legislative rationality in pursuit of a legitimate objective." *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988) (Children are not a suspect

class). The classifications that occur through the implementation of the parental immunity doctrine do not create invidious discrimination nor a suspect class.

Petitioners try to invoke an "intermediate" scrutiny standard based upon the unsubstantiated assertion that Katherine Singleton suffers from permanent brain impairment. (Petition for Writ of Cert. at p.16). However, the record does not contain any proof that Katherine Singleton suffered permanent brain injury, and Petitioners have not at any time from the date of the accident on June 2, 1987 until the present ever sought to have Katherine Singleton declared non-compos mentis. Therefore, since there is no evidence before this Court as to Katherine Singleton's condition it would be improper to invoke the intermediate scrutiny standard.

The "intermediate" scrutiny test should only be used when the "classification, while not facially invidious, nonetheless gives rise to recurring constitutional difficulties" requiring a substantial state interest for the classification. *Plyler* at 217, *citing, Craig v. Boren*, 429 U.S. 190 (1976). (Intermediate substantial interest test used in limited circumstances based upon gender, legitimacy, or alienage).

The Petitioners' reliance upon *Catlin v. Ambach*, 644 F. Supp. 161 (N.D. N.Y. 1986), is misplaced. Chief Judge Munson in *Catlin*, used an intermediate standard because, as he saw it, New York's residence statute created a subclass of children unable to enjoy tuition free public education, a state created right. He also held that the importance of receiving an education was the type of classification that gave rise to recurring difficulties. *Id.* at

166. However, a state's denial of a free education, a state created right, based on the nonresidence of biological parents of a handicapped minor, is clearly not analogous to the state of Texas carving out exceptions to the common law development of the parental immunity doctrine.

The Petitioners' reliance on *Catlin* is also inappropriate because that court was dealing with residence requirements related to a minor's right to education. The state of Texas has the right to exercise its independent jurisdictional power in adopting the concept of parental immunity. Further, the right to sue is fundamentally different from the state-created right to a public education. The societal interest in universal education and having a literate electorate does not compare with the social interest of allowing all unemancipated minors the opportunity to sue their parents for alleged negligence involving parental discretion.

Since it is clear there is no suspect class or fundamental right involved in this case, the proper test for an equal protection analysis is whether the classification is rationally related to a legitimate state interest. *Parham v. Hughes.*

> The Equal Protection Clause does not preclude the state from resorting to classification, but only requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated will be treated alike. *Brown v. State*, 808 S.W.2d 628 (Tex. App. – Austin 1991, writ denied) citing to *Old Dearbourn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 197 (1936).

Further this Court has stated:

> [E]ven if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational. *Martinez v. California*, 444 U.S. 277, 282 (1980) (upholding tort immunity for parole official).

Likewise, this Court in *Ferri v. Ackerman*, 444 U.S. 193, 198 (1979), recognized that "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course the state rule is in conflict with federal law." This Court based the foregoing upon Art. VI, cl. 2 of the United States Constitution.

"Parental immunity is the law in Texas." *Hall* at 908. The state of Texas has a legitimate state interest in preventing judicial interference with parental discretion. This is because the integrity of the family unit is a vital and important institution in American society and has protection under the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment of the United States Constitution. *See, In the Interest of G.M.*, 596 S.W.2d 846 (Tex. 1980); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed. 2d 551 (1972). The Texas Supreme Court recently characterized the purpose of the parental immunity doctrine as follows:

> The real objective of parental immunity . . . is not to promote family harmony; rather, it is

> simply to avoid undue judicial interference with parental discretion. The discharge of parental responsibilities, such as the provision of a home, food, and schooling, entails countless matters of personal private choice. In the absence of culpability beyond ordinary negligence, those choices are not subject to review in court.
>
> *Shoemake v. Fogel, Ltd.*, 826 S.W.2d 933, 936 (Tex. 1992).

The Texas parental immunity doctrine, as it presently exists, sets forth exceptions for intentional torts, the operation of motor vehicle by a parent, and business activities of a parent. *See Aboussie v. Aboussie*, 207 S.W.2d 636 (Tex. Civ. App. – Fort Worth 1954, writ ref'd); *Felderhoff v. Felderhoff*, 473 S.W.2d 928 (Tex. 1971); *Jilani By and Through Jilani v. Jilani*, 767 S.W.2d 671 (Tex. 1988). These exceptions provide ample opportunity for unemancipated minor children to seek redress for the injuries proximately caused by their parents in certain situations. The protection afforded by the Texas parental immunity doctrine for a parent's mere negligence in exercising reasonable parental discretion, supervision and judgment is rationally related to the states valid reluctance to second guess parent's management of purely family matters.

Raising a child is a delicate and unique function for the family, with reciprocal commitments that are not present between a child and a stranger. "Principles of freedom and democracy are closely interwoven with preserving the integrity of family decision making." *Brunner v. Brunner*, 770 F. Supp. 517, 523 (W.D. S. Dakota 1991). *Also see e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Indeed, this Court has recognized that a parent's right to companionship, care, custody and management of his or her children is an important interest that warrants deference and absent a powerful countervailing interest, protection. *Lassiter v. Department of Social Services of Durham Co.*, 452 U.S. 18 (1981), *rehearing denied*, 453 U.S. 927 (1981). Additionally, the custody, care and nurturing of a child resides first in the parents, whose function and freedom include the preparation for obligation for which the state can neither supply nor hinder. *Ginsberg v. New York*, 390 U.S. 629 (1968). Personal decisions regarding child rearing have been recognized as protected liberties under the Fourteenth Amendment's Due Process Clause. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791,120 L.Ed.2d 674, 60 U.S.L.W. 4795 (1992).

The New York Court of Appeals probably articulated the best reason for a court's hesitance to venture into the area of parental discretion regarding the raising of children. In *Holodook v. Spencer*, 324 N.E.2d 338, 343 (N.Y. 1974), the court looked at the adverse impact that judicial intrusion would have on the "fundamental family relation between parent and child." The *Holodook* court stated:

> We can conceive of few, if any, accidental injuries to children which could not have been prevented, or substantially mitigated, by keener parental guidance, broader foresight, closer protection and better example. Indeed, a child could probably avoid most physical harm were he under his parents' constant surveillance and instruction, though detriment more subtle and perhaps more harmful then physical injury might result. *Id.* at 343.

After the doctrine of parental immunity was recognized in *Hewellette v. George*, 68 Miss. 703, 9 So. 885 (1891), forty-two other states adopted some form of parental immunity. Hollister, *Parent Child Immunity: A Doctrine In Search of Justification*, 50 Fordham L.Rev. 489, 494 (1981-82). There are many legitimate policy reasons providing the basis for parental immunity which include 1) the disruption of domestic tranquility, 2) the threat to parental discipline and control, 3) the proliferation of fraudulent and conclusive suits, and 4) the depletion of family resources. *Begley v. Kohl and Madden Printing Ink, Co.*, 157 Conn. 445; 254 A.2d 907 (1969); *Barlow v. Iblings*, 261 Iowa 713; 156 N.W.2d 105 (1968); *Skinner v. Whitley*, 281 N.C. 476; 189 S.E.2d 230 (1972); *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970).

The Texas parental immunity doctrine is rationally related to a legitimate state interest so that the courts will not intrude into the realm uniquely within a family, while allowing judicial recourse when an accident occurs outside this realm. *See, Aboussie, Felderhoff and Jilani.* In *Shoemake* at 936, the Texas Supreme Court considered the issue of parental immunity and whether this theory of law bars a contribution claim in a case where allegations against the parent for negligent supervision and education of the child have been plead. In *Shoemake*, the mother of a two-year old infant filed suit for wrongful death and also as a representative of the child's estate in the survival action against an apartment complex owner under premises liability theories for the drowning of the child. The defendants in this case filed a claim for contribution against the mother in the survival action which was disallowed by the trial court. The Court of Appeals held that

the damages of the child's estate should be reduced by the percentage of fault assigned to the mother under comparative causation. *Fogel Ltd. A.T. v. Shoemake*, 795 S.W.2d 903, 908 (Tex. App. – Ft. Worth 1990, rev'd on other grounds).

In *Shoemake*, the Court recognized that a defendant lacked a claim for contribution unless the child had a claim against the mother for negligence. The Court reviewed the exceptions to parental immunity and held them inapplicable. This Court recognized that the doctrine of parental immunity applied to "alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child." *Shoemake* at 936. The Court further held that since the allegations against the mother were for negligence in the management, supervision and control of the child, the defendant's claims for contribution were barred as a matter of law by the parental immunity doctrine.

Just as in the *Shoemake* case, the Petitioners' allegations are for negligence in the management, supervision and control of the child and therefore are barred as a matter of law by the parental immunity doctrine.

"A child has no cause of action against a parent for injuries arising out of deficient supervision". *Fogel* at 906. The *Fogel* court recognized the continued validity of the parental immunity doctrine with the limited exceptions as recognized by the Texas Supreme Court.

The trial court's granting of Respondents' summary judgments and the appellate courts affirmance of same is rationally related to the reluctance of the courts to get

involved in parental supervision as it allows the court to examine the factual allegations surrounding an accident. If a parent's actions fall, as in this case, within the sphere of parental discretion and control, it is in the state's legitimate interest not to interfere. This is not an arbitrary decision, but a rational decision based upon the uniqueness of a parent/child relationship.

DUE PROCESS/OPEN COURTS DOCTRINE

Petitioners allege that their right to redress has been impaired by the parental immunity doctrine. Respondents contend that Petitioners' right of access to the court and due process rights have not been violated by the parental immunity doctrine.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. U.S. Const. Amend. XIV § 1. Similarly, the Texas Constitution provides that no citizen shall be deprived of life, liberty, property, privileges or immunities except by due course of law. Tex. Const. Art. I, § 19.

The Texas Constitution also provides that "all Courts shall be open, and every person for injury done him, in his land, goods, person or repudiation, shall have remedy by due course of law". Tex. Const. Art. I, § 13. The open Court's provision is a facet of Texas due process. *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983). Texas Constitution Article I, § 13 ensures that Texas citizens bringing common law causes of action will not unreasonably be denied

the right to redress of injury. *Hanks v. City of Port Arthur*, 48 S.W.2d 944 (Tex. 1932).

In analyzing Petitioners' right to redress, the Texas courts examine two criteria: (a) whether the litigant has a cognizable common law cause of action that is being restricted; and (b) the reasonableness and extent of the restriction. *Sax*, at 666. Texas courts have long recognized common law causes of action entitling one to sue for injuries negligently inflicted by others. *Houston and Great Northern Railroad Co. v. Miller*, 51 Tex. 270 (1879). Petitioners' right to sue and be heard has not been impaired. Petitioners have been heard at all levels of Texas courts.

The second criteria that should be examined is the effect of the immunity on the litigant's right to bring his or her cause of action. *Sax*, at 666. This restriction must be weighed against the purpose of the parental immunity doctrine which was clearly annunciated in *Shoemake*.

The wisdom of the underlying policy determination regarding the Texas parental immunity doctrine is best determined by the State of Texas. As such there is no merit in Petitioner's contention that the parental immunity doctrine is unconstitutional when applied to defeat a tort claim arising under state law. *Martinez v. California*, 444 U.S. 277 (1981).

Finally, Petitioners still have valid and ongoing causes of action against the owner and operator of the motorcycle (Hicks) as well as the County of Montgomery, Texas. (*See*, Petition for Writ of Certiorari p. 6). The Petitioners have a right of redress.

Petitioners also advance the novel notion that a parent's death of natural causes, which are wholly unrelated to the tort on which the child's action is based, somehow eliminates the protection of the parental immunity doctrine. First of all, William Singleton passed away after this appeal was perfected. There is no evidence in the record regarding this fact, nor did the appeals court allow the plaintiff to supplement the record with the death certificate after the judgment was rendered. Therefore, the record does not support this argument. However, even if the death of respondent William Singleton, III had occurred prior to summary judgment, Petitioners' case law is still not applicable.

In *Sneed by McCullough v. Sneed*, 705 S.W.2d 392 (Tex. App. – San Antonio 1986, writ ref'd n.r.e.), a minor was allowed to proceed against her deceased father's estate for injuries sustained in a plane crash. The suit was not allowed because her father's death extinguished parental immunity; rather, the court held that the father's conduct was "not referable to his parental responsibilities to plaintiff." *Id.* at 397. As to the father's death, the court stated there would be no disruption of a family relationship "which terminated at the time that plaintiff's action under the wrongful death statute *accrued*." *Id.* (emphasis added). Further, this court has specifically disapproved *Sneed*. *Shoemake* at 973 n.3. Here, respondent William Singleton, III was alive, and maintained a family relationship with Petitioner Katherine Singleton at the time her alleged cause of action accrued. Therefore, parental immunity would apply.

Additionally, Petitioners argue that William Singleton, III lost the protection of the parental immunity

doctrine following his divorce to respondent, Jimmie Lynn Martin. Jimmie Lynn Martin is Katherine Singleton's natural mother and William Singleton, III was her natural father. Following their divorce, William Singleton, III was named possessory conservator. William Singleton, III did not cease being a parent to Katherine Singleton; he merely ended his legal relationship with her mother. To adopt Petitioners' argument would create serious repercussions in Texas family law.

Petitioners attempt to make the argument that the doctrine of parental immunity does not apply to William Singleton, III because he was not the custodial parent at the time of the accident. Petitioners cite two cases for that proposition. Both cases are mis-characterized.

Bondurant v. Bondurant, 386 So.2d 705 (La. App. 1980), a mother brought suit on behalf of her children against her former husband for injuries sustained to her minor children in an automobile accident caused by her former husband. Louisiana statutorily confines parental immunity to torts committed by parents during marriage or by the custodial parent following separation and divorce. *Id.* at 706-07. Texas has no such prohibition. *Bondurant* is not applicable since that same conduct has been recognized in *Jilani* as an exception to the doctrine of parental immunity. *Jilani* at 672-73. The case at bar has nothing to do with injuries sustained in an automobile accident in which William Singleton, III was driving.

In addition, Petitioners cite *Fugate v. Fugate*, 582 S.W.2d 663 (Mo. 1979) for the same proposition. Likewise, the case is not applicable. That case involved a cause of action **against a father by a child for the wrongful death of her mother**. *Id.* Again, this is out of the scope of the doctrine of parental immunity and totally inapplicable to

the facts of this case where a child is suing for personal injuries to herself.

Texas has never barred a non-custodial parent from claiming immunity. In addition, all acts alleged against William Singleton, III fit squarely within a parental role as recognized by this Court. *Jilani* at 672-673; *Felderhoff* at 932-933. This court must give deference to the State of Texas in its interpretation and application of the parental immunity doctrine. *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945).

Additionally, the Petitioners advance the argument that Brent Martin should not be protected by the parental immunity doctrine because he is a step-parent. In contradiction to Petitioners' Petition for a Writ of Certiorari, footnote number 2 on page 22, Brent Martin would show this Court that he is alive and well and living in Conroe, Texas.

Petitioners' argument that a step-parent should not be afforded parental immunity is flawed and misleading to the Court. Brent Martin, as a step-parent is entitled to the same immunities as a natural parent. Brent Martin, as the step-parent of Katherine Singleton, stands *in loco parentis* because he voluntarily assumed the care and support of his step-child, Katherine Singleton. (Tr. at 399-400).

If a husband of a wife receives into his home the wife's child by a former husband, and holds it out to the world as a member of his family, the husband stands to the child *in loco parentis*. *Boyle v. Tully*, 134 S.W.2d 500, (Tex. Civ. App. – Galveston 1939, writ ref'd.); *Drescher v. Morgan*, 251 S.W.2d 173 (Tex. Civ. App. – Fort Worth 1952,

writ ref'd n.r.e.). A step-parent standing *in loco parentis* may exercise the control and authority of a parent. *Gorman v. State*, 42 Tex. 221 (1875). *Hall* at 905.

In *Franks v. Franks*, 138 S.W. 1110 (Tex. Civ. App. – Austin 1911, no writ), the court discussed the relationship between a step-father and a step-child. If a step-parent voluntarily assumes the care and support of a step-child, he stands *in loco parentis*, and the presumption is that they deal with each other as parent and child. *Id.* at 1110. In a step-parent/step-child relationship where a step-parent voluntarily assumes the care and support of the step-child, the ordinary rules of parent and child will be held to apply. *Id.* at 1110.

Brent Martin's actions of receiving Katherine Singleton into his home and assuming for her care caused him to stand to Katherine Singleton *in loco parentis*. The relationship between Brent Martin and Katherine Singleton is that of parent and child, and the ordinary rules of parent and child will be held to apply. *See Franks v. Franks; Boyle v. Tully; Drescher v. Morgan*; and *Hall v. Martin*.

Many jurisdictions, both State and Federal, have ruled that the parental immunity doctrine protects a step-parent. *See Gunn v. Rollings*, 157 S.E.2d 590 (1967); *London Guarantee & Accident Co., Ltd. v. Smith*, 68 N.W.2d 781 (1954); *DeLay v. DeLay*, 337 P. 2d 1057 (1959); *Van Wart v. Cook*, 557 P.2d 1161 (1976); *Rosenberg v. Silver*, 762 F.2d 255 (1985); *Trudell v. Leatherby*, 212 Cal. 678, 300 P. 7 (1931). Other jurisdictions have recognized that parental immunity extends to step-parents, but refused to apply the doctrine because of excessive assaultive conduct. *Wilson*

v. Wilson, 742 F.2d 1004 (1984); *Gillett v. Gillett*, 335 P. 2d 736 (1959). The parental immunity doctrine protects a variety of relationships that exist with a child provided the individual stands *in loco parentis*. The parental immunity doctrine has even been extended to foster parents, grandparents, and uncles that were shown to be standing *in loco parentis*. *See Mathis v. Ammons*, 453 F. Supp. 1033 (E.D. Tenn. 1978). *Newsome v. Department of Human Resources*, 199 Ga. App. 419, 405 S.E.2d 61 (Ga. App. 1991); *Bennett v. Bennett*, 194 Ga. App. 197, 390 S.E.2d 276 (Ga.App. 1990); *Lawber v. Doil*, 547 N.E.2d 752, (Ill. App. 4. Dist., 1989); *Thelen v. Thelen*, 435 N.W.2d 495 (Mich.App. 1989).

CONCLUSION

The Court does not have jurisdiction to grant Petitioners' writ because of the present, adequate, and independent state grounds to uphold the judgement. Secondly, the Petitioners have waived any federal constitutional issues by the failure to properly and timely present these issues to the state court below, nor is it evident from the record that either the Texas Supreme Court or the Court of Appeals in Beaumont ever considered a federal question in the consideration of this case. Therefore, the writ should be dismissed, or in the alternative, denied.

Lastly, even if the Petitioners had properly raised and preserved a federal question under the Fourteenth Amendment, the parental immunity doctrine as it exists in Texas withstands constitutional scrutiny, as it does not

affect a suspect class, nor does it infringe a fundamental right. The sovereignty of Texas should be respected in allowing the state to develop and interpret its own doctrines of civil law. Therefore, the court should deny writ.

Respectfully submitted,

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